JD–09–10
Burton, MI

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

CENTER CONSTRUCTION CO., INC., d/b/a
CENTER SERVICE SYSTEM DIVISION

and

Cases 7–CA–46490
7–CA–46696
7–CA–46697

LOCAL 370, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL–CIO

Sarah Pring Karpinen, Esq., (Region 7, NLRB)
of Detroit, MI, for the General Counsel.

Tinamarie Pappas, Esq., of Ann Arbor, MI,
for the Charging Party.

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of Flint, MI, for the Respondent.

SUPPLEMENTAL DECISION

Statement of the Case

RICHARD A. SCULLY, Administrative Law Judge. On August 27, 2005, the National Labor Relations Board (the Board) issued a Decision and Order (345 NLRB 729) in which it found that Center Construction Co., Inc., d/b/a Center Service System Division (Respondent) had discriminated against Wayne Rose and 12 applicants for a journeyman plumber position in violation of the National Labor Relations Act (the Act).[1] The Board ordered Respondent to offer Rose full reinstatement to his former job, or if that job no longer existed, to a substantially equivalent position and to make him whole for any loss of earnings and other benefits suffered as a result of its discrimination against him. It also ordered Respondent to offer one of the 12 job applicants full instatement to the journeyman plumber position, or if that job no longer existed, to a substantially equivalent position and to make him whole for any loss of earnings and other benefits suffered as a result of its discrimination against him. Scott Mobilo was selected by Respondent as the applicant it would have hired. The parties being unable to agree on the amount of backpay due under the terms of the Board's Order, the Regional Director for Region 7 issued a Backpay Specification, dated January 30, 2009, and an Amended Backpay Specification, dated April 13, 2009.

[1] On April 3, 2007, the United States Court of Appeals for the Sixth Circuit entered judgment enforcing the Board's Order. *Center Construction Co., Inc. v NLRB*, 482 F.3d 425.

A hearing on the Amended Backpay Specification was held in Flint, Michigan on June 16 through 18, 2009. Briefs submitted on behalf of the parties have been given due consideration. Upon the entire record and my observation of the demeanor of the witnesses, I make the following

Findings of Fact

At all times material, the Respondent was engaged in the commercial and residential construction business, which includes the sales, installation, repair and service of heating, air conditioning, and plumbing systems. Wayne Rose is a journeyman plumber who was employed by Respondent from January 2003 until he was unlawfully terminated on September 29, 2003. Rose credibly testified that when he was hired he was told he would be doing all phases of plumbing work. During the approximately nine months of his employment, he did plumbing work on new construction projects and renovations and performed plumbing service and repair work, including, installation of water heaters and boilers. After Rose was terminated, Respondent hired plumber Bradley Liddell to replace him and subsequently hired another plumber, Jeff Blasdell, both of whom performed the same types of plumbing installation and service work that Rose had performed. Since then Respondent has hired other employees but has not offered employment to Rose or Mobilo.

The General Counsel has calculated the backpay due Rose and Mobilo according to the Board's standard formula which uses the amount the employees would have earned but for the discrimination against them, minus any interim earnings. In the case of Rose, it is asserted that the backpay period commences on September 29, 2003, the date he was terminated and continues until Respondent makes an unconditional offer to reinstate him. The calculation is based on the number of hours worked by Liddell, the plumber hired to replace Rose, from September 29, 2003, until September 3, 2005, when Liddell resigned his position. Thereafter, it is based on the average hours worked by Respondent's service technicians, who it is asserted were doing plumbing work that Rose would have done, multiplied by the wage rate of Liddell as adjusted to reflect the annual increases given to Respondent's service technicians. In the case of Mobilo, the alleged backpay period commences on October 5, 2003, the date that Blasdell was hired, and continues until Respondent makes an unconditional offer of instatement to him. Similar to the calculation for Rose, since Blasdell resigned on August 15, 2004, from that date forward the General Counsel used the average hours worked by Respondent's service technicians multiplied by Blasdell's wage rate as adjusted to reflect the annual increases given the service technicians.

Although Respondent raised numerous objections and alleged affirmative defenses in its answer to the backpay specification, it has pursued only three in its post-hearing brief. Respondent contends that in determining the backpay owed Rose and Mobilo the General Counsel should not have considered work performed by its service technicians and that its back pay obligation to Rose and Mobilo ended when the plumbers who had replaced them, Liddell and Blasdell, quit their employment with it due to lack of work and were not replaced. This was August 2004 in the case of Mobilo and September 2005 in the case of Rose. It further contends that if backpay is awarded for periods after those dates the General Counsel's computation is inflated because it includes done by service technicians that neither Rose nor Mobilo would have performed. It also contends that in computing interim earnings for Rose and Mobilo it was unfair for the General Counsel not to take into consideration all of the overtime hours they worked.

Analysis and Conclusions

A backpay order is designed to vindicate the policies of the Act by making the employees whole for losses suffered on account of the unfair labor practices. *Nathanson v. NLRB*, 344 U.S. 25, 27 (1952). When loss of employment is caused by a violation of the Act, the finding of an unfair labor practice is presumptive proof that some backpay is owed. *St. George* Warehouse, 351 NLRB 961, 963 (2007); *Weldun International*, 340 NLRB 666, 671 (2003); *Beverly California Corp.*, 329 NLRB 977, 978 (1999). It is the General Counsel's burden to show the amount of gross backpay due each claimant. The burden then shifts to the respondent to negate or mitigate its liability. *Weldun International*, supra; *Hansen Bros. Enterprises*, 313 NLRB 599, 600 (1993). The General Counsel is allowed wide discretion in selecting a formula to determine the backpay due. A formula which closely approximates what the claimants would have earned had they not been discriminated against is acceptable if it is not unreasonable or arbitrary under the circumstances. *Met Food*, 337 NLRB 109, 110 (2001); *La Favorita, Inc.*, 318 NLRB 902, 903 (1995). A backpay claimant should receive the benefit of any doubt rather than a respondent, the wrongdoer responsible for the uncertainty and against whom any uncertainty must be resolved. *Alaska Pulp Corp*., 326 NLRB 522, 523 (1998).

Here, the backpay formula employed by the General Counsel initially used the hours worked by plumbers employed by the Respondent, but once there were no longer any plumbers working for it, the hours worked by service technicians were used. Moreover, the General Counsel asserts that the backpay period for Rose and Mobilo continues to run because Respondent has never made an offer of employment to either. The issue is whether under the circumstances this formula was reasonable and appropriate. Respondent asserts that it was not because the backpay period ended when its only journeymen plumbers quit their employment due to lack of work and were not replaced.

The Respondent relies on cases in which the Board has held that backpay period had ended where the employer established that the discriminatees would not have been employed beyond a certain date. These cases involved situations, such as, where the employer established that discriminatees would have been laid off for legitimate economic reasons, including, lack of work, cessation of the employer's business operations, and a significant change in the nature of the employer's business operations which resulted in a reduction of the number of employees required. It contends that, after plumbers Liddell and Blasdell left its employ, it was no longer doing any new construction work and that is the only work Rose and Mobilo could have done for it.

I find that Respondent has not established that there was such a significant change in its business operations in 2004 and 2005 as to relieve it of liability for backpay to Rose and Mobilo or that they would have been laid off due to lack of work. On the contrary, the evidence shows that even today there is little that is different in Respondent's overall business than was the case before it engaged in the unlawful discrimination against them. On its current website, Respondent states that since 1967 it has been "a full service heating, cooling, plumbing and commercial refrigeration company." Its current business cards describe it as doing commercial and residential plumbing, heating, cooling and refrigeration and it is listed in the current telephone book Yellow Pages under "Plumbing Contractors." Respondent's vice president Kristina Eagleson testified that after 2005, although the company no longer had separate new construction plumbing and heating departments, it still continues to bid on new construction plumbing jobs and on plumbing remodeling jobs and still does plumbing service work. As she put it, "we haven't changed anything besides we don't have two departments because the economy doesn't bear it." In other words, while the volume of work may have decreased somewhat, there was no essential change in the types of work Respondent has been

performing.

The evidence also does not support the Respondent's claim that the only person employed by it since Liddell and Blasdell left its employ to have done plumbing work for it was Kristina Eagleson. Union Business Agent Mark Johnson's credible and uncontradicted testimony shows that in the fall of 2007 he met with Kristina and company President Robert Eagleson who told him that nine of Respondent's ten employees were performing plumbing work, including, installation of water heaters and bathroom remodels and that it was interested in signing Local 370's current collective-bargaining agreement. He had a similar discussion with Respondent's representatives in early 2009. Phillip Murphy, who is currently employed by Respondent as a service technician, described the work he has regularly performed for the past ten years as including "lots of different types of plumbing repairs, sinks, sump pumps, water heater change-outs, water heater repair and just about anything that comes up along the repair lines." He said that almost every time he replaced a water heater it required new piping and replacement of a dielectric union.

Johnson, who is an licensed plumber with twenty years of experience in that field and has served on a committee that drafted the Michigan plumbing statute, testified that changing and reconfiguring piping and replacement of dielectric unions involves plumbing work as defined in that statute. Such work requires a plumbing permit and that the work be performed by a licensed plumber, as does anything beyond a minor repair to a plumbing system. Johnson testified that the work shown on many of the Respondent's service sheets during the backpay period falls within the definition of plumbing work in the state statute. The evidence clearly establishes that Rose and Mobilo who are journeyman plumbers were qualified to do such work.

Respondent's argument is that when it employed plumbers they were part of its new construction plumbing department which no longer exists. They performed only construction and major home remodeling work and its service technicians, not its plumbers, always performed the installation, service, and repair work described by service technician Murphy, notwithstanding, the fact that such work may fall within the statutory definition of plumbing work. Thus, it contends that since it no longer has a new construction plumbing department, it has no jobs for Rose and Mobilo and the backpay period ended when the last plumber left its employ.

First, this argument is not supported by the evidence. Rose credibly testified that when he interviewed for the job with Respondent he was told it involved "all phases" of plumbing work, not just construction. He said that during the approximately nine months he worked for Respondent he performed not only new plumbing construction work but plumbing service work at commercial and residential sites as well. The Center Service truck he drove had supplies for use in installation and service work and he was given a cell phone to use to request parts when needed on a service call. At times, he was sent to perform service jobs and was supervised by the service department manager Lonnie Katz. He filled out service ticket and collected money for the service calls he made just as Respondent's service technicians did. Some of the service calls he recalled involved the installation or replacement of boilers, well and sump pumps, repair or replacement of water heaters, repairing leaks, replacing pipes, and clearing drains. The Respondent's records corroborate his testimony that he performed a substantial amount of service as opposed to construction work while he was employed by it. Those records do not establish, as Respondent claims, that the only plumbing service and repair work Rose performed involved warranty work related to new construction or major remodeling jobs. There is also no evidence that plumbers Liddell and Blasdell did not perform the same kinds of jobs that Rose did while employed by the Respondent.

Second, and more important, Respondent's argument ignores the fact that the Board's Order, as enforced by the Court of Appeals, requires that if the positions to which Rose and Mobilo were ordered to be offered reinstatement and instatement, respectively, no longer exist, they must be offered "substantially equivalent positions." The evidence shows that throughout the backpay period designated in the backpay specification Respondent had numerous "substantially equivalent positions" involving plumbing installation, service, and repair work that Rose and Mobilo were qualified to perform.[2] Accordingly, I find that Respondent has not established that its business had changed to such a degree that it was no longer doing plumbing work similar to that performed by Rose before the discrimination against him and has not established that that it did not have "substantially equivalent positions" that Rose and Mobilo could have performed at all times during the backpay period. Consequently, their backpay has not been tolled. *Fluor Daniel, Inc.*, 351 NLRB 103, 104 (2007).[3]

Respondent also contends that the General Counsel should not have used the hours worked by its service technicians in computing the backpay due after the plumbers Liddell and Blasdell left its employ because only a small percentage of the work they performed involved plumbing work that Rose and Mobilo would have performed. As noted above, the General Counsel is allowed wide discretion in selecting a formula to determine the amount of backpay due. That formula is based on evidence that its service technicians performed work that Rose and Mobilo could have performed. Again, Respondent's argument is based on its erroneous premise that (1) Rose and Mobilo would only have done new construction and remodeling work; and (2) that it had very little of that work, as evidenced by the fact that Liddell and Blasdell quit its employ due to lack of work. First, there is no credible evidence, testimonial or documentary, to support the hearsay assertion that Liddell and Blasdell quit due to lack of work. Moreover, Respondent has not proved its assertion that the plumbing work that Rose and Mobilo would have done constituted only a small percentage of its overall work. Nor, has it shown that there was not enough work to keep Rose and Mobilo employed throughout the backpay period. As counsel for the General Counsel points out, Respondent failed to present any evidence showing the percentages of plumbing and non-plumbing work it performed. Such evidence would presumably be in its own records and is failure to produce it warrants an inference that it would not have supported Respondent's position. Rather than producing that evidence, it seeks to fault the General Counsel for failing to reconstruct with precision the percentages of such work from its records. In fact, the General Counsel has made a reasonable effort to reconstruct and approximate the economic situation of the discriminatees, but for Respondent's illegal discrimination against them. That is all that Board law requires. Respondent has failed to show that the method used to compute backpay was unreasonable or arbitrary or to establish facts that negate or mitigate its liability.

Finally, Respondent contends that the General Counsel erred in computing interim earnings for Rose and Mobilo by not using all of the overtime hours they worked but only the

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[2] I see no merit in Respondent's claims that because it may perform work under permits obtained under its mechanical contractors license, which does not require a licensed plumber, it was excused from offering employment to Rose and Mobilo. This has no bearing on whether or not it had "substantially equivalent positions" positions available.

[3] In connection with its argument on this issue, Respondent's post-hearing brief refers to the Board's decisions in *Toering Electric Co.*, 351 NLRB 225 (2007) and *Oil Capitol Sheet Metal, Inc.*, 349 NLRB 1348 (2007). These are salting cases which it apparently claims should be applicable to the backpay claim of Mobilo. I do not agree. When it failed to raise these issues in its answer or at the hearing, they were waived. Moreover, it has failed to establish that Mobilo was in fact a "salt."

overtime hours equal to the overtime hours worked by Respondent's employees during the backpay period. This it says is unfair and makes the discriminatees better off than they would have been had they been working for it. The Board has long seen it the other way around and holds that if a diligent backpay claimant chooses to work additional overtime during interim employment it should operate to his advantage not that of the employer required to make him whole for a discriminatory discharge. E.g., *United Aircraft Corp.*, 204 NLRB 1068, 1073 (1973); *Regional Import & Export Trucking Co.*, 318 NLRB 816, 818 (1995).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The Respondent, Center Construction Co., Inc., d/b/a Center Service System Division, Burton, Michigan, its officers, agents, successors, and assigns, shall pay to the employees named below the indicated amounts of net backpay with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), less taxes required by law to be withheld:

Wayne Rose	$67,267.71
Scott Mobilo	59,381.48

IT IS FURTHER ORDERED that Respondent shall take the following affirmative action:

Offer Wayne Rose immediate reinstatement to his former position or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for all losses he has suffered after the backpay period computed in the backpay specification, because Respondent has not made a valid offer of reinstatement to him.

Offer Scott Mobilo immediate instatement to the position for which he applied or, if that position no longer exists, to a substantially equivalent position, with the same seniority and any other rights or privileges he would have enjoyed if he had been continuously employed by Respondent, and make him whole for all losses he has suffered after the backpay period computed in the backpay specification, because Respondent has not made a valid offer of instatement to him.

Respondent shall continue to be liable for backpay until such time as it makes a sufficient reinstatement offer to Wayne Rose and a sufficient instatement offer to Scott Mobilo.

Dated, Washington, D.C. February 17, 2010

Richard A. Scully
Administrative Law Judge

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.